IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TED JAMES KIESTLER, Appellant.	No. 33329-5-II UNPUBLISHED OPINION

HOUGHTON, P.J. -- Ted Kiestler appeals his conviction of residential burglary, raising various arguments through counsel and in his Statement of Additional Grounds (SAG).[1] We affirm.

FACTS

On November 12, 2003, David Burrows returned to his Spanaway home at about 5 p.m. As he turned into his driveway, he saw two men in a tow truck leaving the property. The men were later identified as Kiestler and Scott James Ahrens. Burrows called out, "Can I help you?" 2 Report of Proceedings (RP) at 78. Kiestler and Ahrens did not respond and continued to drive away.

Burrows had secured the garage door with a padlock when he left home that morning.

[1] RAP 10.10.

Upon returning, he found the padlock ripped off and the garage door torn from its frame and jutting out several inches. The opening could allow a person to enter the garage.

A utility room is between the garage and the dwelling's interior. From inside the garage, someone kicked in the door to the utility room. Burrows discovered additional damage to the door leading from the utility room to the interior living space.

Burrows had three functional surveillance cameras at the house. The tape from the surveillance cameras shows Kiestler's tow truck entering and exiting the property twice that day: first between 3:01 and 3:12 p.m. and again between 4:27 and 4:51 p.m. The tape shows that during the time the tow truck remained at the property, the lights in the utility room turned on and off twice. The tape also shows the shadow of a person apparently peering into the utility room, but it does not reveal the person's face. According to Burrows, the utility room light can only be turned on from inside the house. The tape did not record any other vehicles or individuals at the property during the time Kiestler and Ahrens were there.

Burrows called the Pierce County Sheriff's Department. Deputy William Ruder responded. He observed the garage door pulled outward, off its hinges. From the damage to the padlock and hasp, Ruder believed that the door had been pulled out and could not have been pushed in. He saw that the door from the garage to the utility room was kicked in. He also saw that someone had pried off some metal bars from another interior door. He watched the surveillance tape and recognized Kiestler from prior police contacts.

Deputy Shawn Butler went to Kiestler's home the next day and questioned him. Kiestler told him that someone named "Cowboy" asked him to meet him at the property to tow away a red Camaro. 2 RP at 54. Kiestler said that "Jim" went with him, but he said he did not know Jim's

last name or contact information. 2 RP at 54.

Initially, Kiestler said they simply waited for "Cowboy", and then left when he never appeared. When the deputy told him about the surveillance tapes, Kiestler appeared surprised. Then he said that he and Jim merely peered into the windows out of curiosity because the house had a "for sale" sign. 2 RP at 102. He also said that Jim accidentally backed the tow truck into the garage door, damaging it. According to Kiestler, he went into the garage to try to push the door back out. Later, he denied ever entering the garage, stating that he had pushed it in from the outside.

The State charged Kiestler with residential burglary and second degree malicious mischief. In preparing for trial, Kiestler asked his counsel to find "Cowboy" and present him as a witness. "Cowboy" is Burrows' estranged nephew, Jason Duncan. After preliminary attempts to locate him failed, defense counsel told the investigator not to expend more resources pursuing "Cowboy." Kiestler's counsel told Kiestler not to worry about it, because "Cowboy's" testimony likely would not be helpful.

A jury heard the matter. Kiestler did not testify, but Ahrens did. According to Ahrens, he and Kiestler operated an automobile repossession business. Ahrens testified that "Cowboy" asked them to go to the property to tow away a Camaro. While they were waiting for "Cowboy" to show up, they checked the outside of the house because there was a "for sale" sign in the window. They never entered the garage or the house. They never turned on the lights. But during their second trip to the residence, they accidentally backed into the garage door, damaging it. According to Ahrens, they tried to find contact information on the "for sale" sign so they could locate the owner and offer to pay for the damage, but the sign was blank. Eventually, they

left because "Cowboy" never showed up.

According to Burrows, nothing was missing from the house. He said there was a gray Camaro parked behind the garage, that belonged to a friend. A week earlier, Burrows' new Harley Davidson motorcycle was inside the garage; but on the day of the break-in, only an old pickup truck was inside.

Kiestler's extensive criminal history includes charges for theft, passing bad checks, possession of stolen property, and burglary. Most recently, a jury had acquitted him of seven counts of burglary. He believed the current charges were part of a vendetta against him arising from Ruder's displeasure about the acquittal. Thus, Kiestler urged his defense counsel to impeach Ruder for bias by questioning him about the prior burglary prosecution.

During cross-examination, Kiestler's counsel questioned Ruder as follows:

> Q . . . You know Mr. Kiestler, don't you?
> A I do.
> Q And you know him from previous encounters; isn't that correct?
> A That's correct.
> Q And you previously arrested Mr. Kiestler for seven counts of, was it, burglary?
> A I don't recall all of what I've arrested him for, to be honest with you.
> Q Do you recall testifying last year in a trial?
>
> [Prosecutor]: Objection, I don't know where we're going with this, Your Honor. He's opening up a door here that I don't believe he wants to open.
>
> The Court: I'll allow it. . . .
> Q [Defense Counsel]: Do you recall testifying at Mr. Kiestler's trial last year?
> A I don't recall when it was, but I recall testifying at a trial recently -- well, not -- in the last year or two, yes.
> Q Isn't it true that he had a jury trial on all seven counts and was found not guilty of the charges you arrested him for previously?
> A I have no idea what the verdict was on it.
> Q You don't know what the verdict was?
> A No.

Q How many times have you arrested Mr. Kiestler?
A I don't know right off.
Q Was it more than two?
A I've assisted in arresting him before, but I don't know if I've personally arrested him. We've arrested him on probation violations and other things besides fresh crimes too.

2 RP at 67-68.

On redirect examination, the prosecutor asked the deputy whether he had been aware that Kiestler had "several other felony convictions." 2 RP at 69. The deputy replied, "Yes, I was." 2 RP at 69.

In his closing argument, Kiestler's defense counsel responded to the prosecutor's suggestion that Kiestler had been untruthful when he told police he did not know Ahrens' surname or contact information: "Mr. Kiestler certainly does know Deputy Ruder, though. He knows him well, and I don't think he wanted to give Deputy Ruder any information about Jim or anybody else any more than he had to do. We all heard Deputy Ruder, and he knows Mr. Kiestler. Deputy Ruder is not very believable when he says, oh, I don't know how that last trial turned out." 3 RP at 218.

The court instructed the jury that "[a] person who enters unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given." Clerk's Papers (CP) at 28. Kiestler's counsel did not object to the instruction. After deliberating for four hours, the jury returned a guilty verdict on both counts.

After the trial, Kiestler's investigator located Duncan ("Cowboy") at a campground and obtained his affidavit. Duncan stated that he asked Kiestler to meet him at his uncle's house

between 3 and 4 p.m. that day because there was a Camaro there that he thought "might be stolen." CP at 64. Duncan said that he could not make the appointment because of car trouble.

Kiestler moved for a new trial and, in the alternative, a motion to arrest judgment, based on newly discovered evidence, ineffective assistance of counsel, and insufficiency of the evidence. The trial court granted the motion to arrest judgment on the malicious mischief conviction, concluding that the State failed to prove that Kiestler caused damage in excess of $250. But the trial court denied Kiestler's motion for a new trial on the burglary charge.

Kiestler appeals.

ANALYSIS

Ineffective Assistance of Counsel

Kiestler contends that he received ineffective assistance of counsel when his attorney introduced evidence of his criminal history, failed to object to the permissive inference instruction, and failed to investigate and present exculpatory evidence.

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). To prevail in an ineffective assistance claim, a defendant must show both deficient performance and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To establish deficient performance, a defendant must show that the attorney's performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362. To establish prejudice, a defendant must demonstrate that, but for the deficient representation, the outcome of the trial would have differed. *McNeal*, 145 Wn.2d at 362. We presume that the defendant received adequate

representation. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If we can reasonably characterize the defense counsel's performance as a legitimate trial strategy or tactic, an ineffective assistance claim fails. *McNeal*, 145 Wn.2d at 362.

Kiestler argues that defense counsel gave an objectively unreasonable performance because no legitimate tactical reason exists for informing the jury of his various prior arrests, prosecutions, and convictions, and, in particular, his recent prosecution for seven counts of burglary. He claims his attorney's deficient performance prejudiced him because weak evidence established unlawful entry and criminal intent, as shown by the length of the jury deliberations (four hours).

Ordinarily, a defendant cannot prevail in an ineffective assistance claim based on the defense counsel's strategic decisions. *State v. Day*, 51 Wn. App. 544, 553, 754 P.2d 1021, *review denied*, 111 Wn.2d 1016 (1988). But this is a rare instance in which the defense counsel's strategy is objectively unreasonable. There may be unique factual circumstances that could justify a strategic decision to elicit testimony from a police officer about a defendant's criminal history in order to impeach the officer for bias. *See In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 742, 16 P.3d 1 (2001) (cautioning against creating rules of reasonable conduct that may restrict attorneys' wide latitude in making strategic decisions). But the defense counsel's cross-examination of Ruder in this case cannot reasonably be characterized as a legitimate trial strategy or tactic.

Nothing indicates that Ruder had a personal interest in Kiestler's conviction greater than that of any other police officer who knew about Kiestler's prior felony convictions and had arrested him numerous times for both parole violations and "fresh crimes." Introducing evidence

of Kiestler's prior criminal conduct raised an inference that he was a bad character with a general propensity for criminality, thereby making it more likely that he had committed the charged crime. *See State v. Perrett*, 86 Wn. App. 312, 319-20, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997). Given that Kiestler had so little to gain from attempting to impeach Ruder for bias, and so much to lose from bringing to light his extensive criminal history, the defense counsel's cross-examination of Ruder was not a legitimate trial tactic. The defense counsel's performance fell below an objective standard of reasonableness and was deficient.

Next we turn to the question of whether defense counsel's deficient performance prejudiced Kiestler. A review of the record discloses that it did not.

The surveillance tape recorded Kiestler's presence at the house. The surveillance tape showed that no one else visited the house during Burrows' absence that day. The surveillance tape also showed that the interior lights were turned on during the brief time Kiestler and Ahrens were at the property. The lights only could have been turned on from inside the house. This evidence overwhelmingly establishes Kiestler's unlawful entry to the house.

Photographs of the crime scene and testimony by Burrows and Ruder established that during Burrows' absence the garage door, which he had secured with a padlock, was pulled outward off its hinges. The door leading from inside the garage to a utility room was kicked in and another door leading from the utility room to the interior living space also was damaged.

When questioned, Kiestler gave inconsistent statements to the police. Before learning that a surveillance tape captured his presence at the house, Kiestler denied having damaged or entered the house; later he said the damage was an accident and he only entered the garage to push the door out; finally, he denied ever entering the garage.

Kiestler's defense was that he accidentally backed his tow truck into the garage while waiting to meet someone, then pushed the door back out without entering the garage. He tried to find contact information to notify the owner of damage.

Kiestler's defense was contradicted by evidence that the door was damaged by being pulled outward, by his avoidance of Burrows as he exited the property, and by his own inconsistent statements to the police.

Given the overwhelming evidence that Kiestler and/or Ahrens broke into the house, kicked in the utility room door and damaged another interior door, there is no reasonable possibility that the outcome would have differed but for the defense counsel's deficient performance.

Kiestler further argues that counsel provided ineffective assistance in failing to investigate and/or present witnesses, notably, "Cowboy," whom Kiestler argued could bolster his defense.

Before trial, defense counsel asked an investigator to locate "Cowboy." The investigator did not succeed in his early attempts to find the witness and counsel chose not to spend further time locating the witness unless Kiestler could secure more information as to "Cowboy's" whereabouts. Kiestler cannot establish that defense counsel engaged in other than legitimate trial tactics in deciding how to investigate the case and his argument fails.

Kiestler also argues that counsel provided ineffective assistance in failing to object to the permissive inference instruction. Because, in our following analysis, we hold that the trial court did not err in giving the permissive inference instruction, Kiestler's ineffective assistance claim based on this ground fails.

Permissive Inference Instruction

Kiestler next argues that the trial court erred in giving the permissive inference instruction. He asserts that the instruction relieved the State of its burden to prove the element of criminal intent, denying him due process. Although Kiestler did not object to the instruction at trial, giving a jury instruction that relieves the State of its burden to prove every element of the crime is a constitutional error that we may review for the first time on appeal. *See* RAP 2.5(a)(3); *State v. Hanna*, 123 Wn.2d 704, 709-10, 871 P.2d 135 (1994) (challenged inference of intent instruction reviewable for the first time on appeal).

We review challenged jury instructions de novo. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). Adequate instructions permit each party to argue its theory of the case and accurately state the applicable law without misleading. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002).

Due process requires the State to prove each element of a crime beyond a reasonable doubt. *Hanna*, 123 Wn.2d at 710. Residential burglary has two elements: (a) unlawfully entering or remaining in a dwelling other than a vehicle and (b) intent to commit a crime against a person or property in that dwelling. RCW 9A.52.025(1).

The State may rely, in part, on permissive inferences to meet its burden of proof. *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). A permissive inference allows, but does not require, a jury to infer the existence of a presumed fact from a proven fact. *Hanna*, 123 Wn.2d at 710. In burglary prosecutions, the State may rely on a statutorily-created permissible inference that a person who enters or remains unlawfully in a building has the intent to commit a crime therein. RCW 9A.52.040; *State v. Brunson*, 128 Wn.2d 98, 111, 905 P.2d 346 (1995). Here, the

trial court gave the pattern jury instruction that is modeled after the statutory inference of intent. 11A Washington Pattern Jury Instructions: Criminal 60.05, at 9 (Supp. 1998).

When a permissible inference is only part of the proof supporting an element, the State need only show that the presumed fact more likely than not flows from the proven fact. *Deal*, 128 Wn.2d at 699-700. But when the inference is the "sole and sufficient" proof of an element, the reasonable doubt standard applies. *Deal*, 128 Wn.2d at 699-700.

We evaluate the propriety of a permissive inference instruction on a case-by-case basis in light of the particular evidence presented by the State. *Hanna*, 123 Wn.2d at 712.

Kiestler contends that the permissive inference instruction was improper, relying on *State v. Jackson*, 112 Wn.2d 867, 774 P.2d 1211 (1989).

In *Jackson*, a suspect fled after a police officer spotted him kicking in the glass door of a liquor store. The State charged the suspect with attempted burglary. The jury returned a guilty verdict after receiving a permissive inference instruction. Our Supreme Court reversed, holding that a permissive inference instruction can only be given when the State presents proof of the defendant's actual unlawful entry. *Jackson*, 112 Wn.2d at 870. The *Jackson* court held that the instruction was improper in that case because the defendant's conduct was consistent with either attempted burglary (a felony) or malicious mischief (a misdemeanor). 112 Wn.2d at 876. The facts in *Jackson* are distinguishable. Here, the State presented evidence that Kiestler unlawfully entered the dwelling, not merely that he attempted to do so. A permissive inference instruction is proper "'whenever the evidence shows a person enters or remains unlawfully in a building.'" *State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006) (quoting *State v. Grimes*, 92 Wn. App. 973, 980 n.2, 966 P.2d 394 (1998)).

Kiestler further asks us to test the propriety of the instruction against the reasonable doubt standard, arguing that the permissive inference was the sole and sufficient evidence in support of the intent element. We decline to do so here.

The State did not rely on the inference as its sole evidence supporting the element of criminal intent. The State presented evidence that a garage door had been pulled off its hinges; an interior door had been kicked in; a metal bar was broken off another interior door; Kiestler and Ahrens twice returned to the residence (in the prosecutor's words, they were "casing the joint") 3 RP at 202; the surveillance tape shows the utility room light turning on and off; Kiestler gave inconsistent statements to the police, appearing surprised after learning his presence was captured on tape; as Kiestler and Ahrens left the property, they did not respond to the victim's attempt to communicate with them. The evidence presented by the State provided sufficient evidence, regardless of the inference instruction, to find intent to commit a crime. Thus, the preponderance standard applies. *See Brunson*, 128 Wn.2d at 109.

The inference of intent instruction given here satisfies the preponderance standard and is a constitutionally permissible inference. *Brunson*, 128 Wn.2d at 101, 111. *See also State v. Bishop*, 90 Wn.2d 185, 189, 580 P.2d 259 (1978) (holding that "common knowledge and experience" support the permissive inference instruction because "[t]he noncriminal reasons for unlawfully entering a dwelling are few"). Because the State presented sufficient evidence to support the trial court's decision to give the permissive inference instruction, Kiestler's argument fails.

Cumulative Error

Under the cumulative error doctrine, the cumulative effect of trial court errors may result in an unfair trial even if none of the errors, analyzed alone, requires reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The doctrine does not apply because there are no errors to accumulate.

SAG

Sufficiency of the Evidence

In his SAG, Kiestler contends that insufficient evidence supports the conviction. In raising this argument, he makes several incorrect assertions. He asserts the court found "as a matter of law," that the State did not prove that any damage occurred to Burrows' garage door. SAG at 2.

Because Burrows repaired the damage himself and the State offered no evidence of the costs of repairs, the court found that the State did not prove the damage exceeded $250. But the court did not find that *no* damage occurred and Kiestler's argument fails.

Kiestler also claims that the State did not prove its theory that he had pulled the garage door out, rather than accidentally pushing it in, because it failed to produce the padlock and hasp. Kiestler's assertion that the padlock and hasp (which were not presented in evidence) would exculpate him is mere speculation.

Sufficient evidence supports a conviction if it permits any reasonable person to infer all the elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In reviewing an insufficiency claim, we view the evidence in the light most favorable to the State, presuming the truth of the State's evidence and drawing all reasonable inferences from it. *Salinas*, 119 Wn.2d at 201. We do not review the jury's credibility determinations or its resolution of conflicting evidence. *State v. Camarillo*, 115 Wn.2d 60, 71,

794 P.2d 850 (1990). We consider direct and circumstantial evidence equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To convict Kiestler of residential burglary, the State had to prove that he or an accomplice unlawfully entered Burrows' residence with the intent to commit a crime therein.
As previously discussed in the context of Kiestler's ineffective assistance claim, the evidence was more than sufficient to support the jury's conclusion that he and/or Ahrens unlawfully entered Burrows' residence with the intent to commit a crime therein.

Surveillance Tape

Kiestler next argues that the prosecutor committed misconduct by altering the surveillance tape. Contrary to Kiestler's argument, the State properly authenticated the tape at trial, subject to questioning by Kiestler's counsel about the chain of custody.

At trial, the court and counsel extensively discussed which portions of the tape would be shown to the jury. Fewer than 30 minutes of the lengthy tape related to the State's case. The prosecutor and Kiestler's counsel agreed that the State would show only the relevant portions, fast-forwarding through periods of inactivity. The State made the tape available to Kiestler during discovery, and he had an opportunity to present any portions that may have been helpful to his defense. The prosecutor and Kiestler's counsel also agreed that the jury could view the tape as many times as it wanted (the jury viewed the tape several times during deliberations). In his SAG, at 8, Kiestler presents statements outside the record, taken out of context, to suggest that the prosecutor altered the tape. The argument fails.

Lesser included offense instruction

Kiestler further argues that the trial court erred in failing to instruct the jury on the lesser-

included offense of criminal trespass. This argument fails. Kiestler never proposed a lesser-included offense instruction. The failure to give a lesser-included offense instruction is not an error of constitutional magnitude that may be raised for the first time on appeal. *State v. Scott*, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988). Thus, Kiestler waived the issue at trial.

Cumulative Error

Finally, Kiestler argues that cumulative error entitles him to reversal. This argument fails for the reason stated in our cumulative error analysis above.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

_____
Houghton, P.J.

We concur:

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Bridgewater, J.

_____
Penoyar, J.